Supreme Court, U.S.
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No. ——

In The
Supreme Court of the United States

LJUPCO RISTOVSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Trial Court's Failure to Completely Instruct the Jury on the Willfulness Elements of 26 USC §7206(1) and 26 USC §7207, Excluding Instructions on How to Consider Evidence Favorable to the Defense, Deprive Petitioner of his Sixth Amendment Right to a Fair Jury Trial.

2. Did the Use of a Presumption Rather than Proof of a Tax Loss Amount for Uncharged Relevant Conduct Used to Increase Petitioner's Sentence Guideline Level Pursuant to USSG §2T1.1 deny Petitioner his Fifth Amendment Right to Due Process.

3. Did the Court of Appeals Use Improper Double Counting by Aggregating Tax Loss Amounts for Tax Fraud Counts and Tax Evasion Counts on which the Petitioner was not Convicted to Compute Petitioner's Sentence Guideline Offense Level.

PARTIES TO THE PROCEEDINGS

Petitioner

Ljupco Ristovski. Petitioner is an individual and has no corporate affiliations.

Respondent

The United States of America

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OPINION BELOW

The opinion of the United States Court of appeals for the Sixth Circuit is reported at 211 F3d 1271 (6th Cir., 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on April 18, 2000 and amended on May 8, 2000. Rehearing and Rehearing En Banc were denied on July 25, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1) and §2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Attempt to Evade or defeat tax
26 USC §7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Fraud and false statements
26 USC §7206(1)

Any person who --

(1) Declaration under penalties of perjury. --Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ...

shall be guilty of a felony, and upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Fraudulent returns, statements, or other documents
26 USC §7207

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material manner, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to subsection (b) of section 6047 or pursuant to subsection (d) of section 6104 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

STATEMENT OF THE CASE

Petitioner Ristovski was indicted by a grand jury in the Eastern District of Michigan on June 6, 1996 in a twelve-count indictment charging tax evasion (Counts 1 and 2) in violation of 26 USC §7201 for the years 1989 and 1990, filing false corporate tax returns in violation of 26 USC §7206(1) (Counts 3 and 4) for the same years, and making and submitting false documents to the Internal Revenue Service district office in Detroit, Michigan in violation of 26 USC §7207 (Counts 5-12). Trial took place from September 24, 1997 through October 14, 1997. The jury found Petitioner

Ristovski guilty on Counts 3-12. A mistrial was declared on Counts 1 and 2. Those counts have been dismissed.

Petitioner Ristovski was sentenced on June 24, 1998 to a term of 18 months custody on Counts 3 and 4 and 12 months custody on Counts 5-12, all to run concurrently, followed by a one year term of supervised release and a fine of $35,000.

On appeal to the United States Court of Appeals for the Sixth Circuit, Petitioner Ristovski challenged the sufficiency of evidence to prove that he willfully subscribed to false corporate tax returns, failure of the trial court to instruct the jury on the element of willfulness and the sentence imposed by the district court because the court included uncharged conduct for the year 1988 in computation of a tax loss amount pursuant to USSG §2T1.1; and because the trial court used an edition of the sentence guideline manual that raised ex post facto concerns. The court used the 1997 edition of the Sentence Guideline Manual and determined that his offense level was 14 and that his criminal history category was II.

The Government filed a cross-appeal arguing that Petitioner's sentence was computed incorrectly because the court failed to aggregate tax loss amounts from Petitioner's personal returns with amounts attributable to corporate returns and because the district court computed Petitioner's criminal history incorrectly.

On April 18, 2000, the United States Court of Appeals for the Sixth Circuit affirmed Petitioner's convictions and concluded that the trial court's refusal to give Petitioner's requested jury instruction on willfulness, which included a proposed instruction that "mere negligence, inadvertence,

mistake, a careless disregard for the truth, or even gross negligence is not sufficient to constitute willfulness", was not misleading to the jury; that use of the 1997 version of the sentence guidelines instead of the 1991 edition was error; that use of a presumed tax loss amount for uncharged tax evasion on Petitioner's personal return for the year 1988 was proper; that the trial court's failure to aggregate tax loss amounts for personal and corporate returns was error; and, that the trial court's exclusion of prior misdemeanors in determining Petitioner's criminal history category was error.

The sentence errors found by the Court of Appeals nullified each other. Petitioner's sentence remained the same.

Petitioner filed a Petition for Rehearing and Rehearing En Banc as to Issue 3 only on May 18, 2000. By an Order dated July 25, 2000, the court denied Petitioner's Petition for Rehearing and Rehearing En Banc.

Petitioner Ristovski began operating Precision Steel Shearing (PSS) in 1984 in Detroit, Michigan. The company was owned by other family members. Scrap metal from the company's operations was sold to Mason Iron and Metal (Mason). As part of a long-standing practice for its customers, Mason paid for the scrap by issuing checks payable to PSS and payable to cash. The checks payable to cash totaled $105,000 in 1988, $92,542 in 1989 and $42,000 in 1990. (Vol I, p. 16, Prosecutor's JA, 550; Vol I, pp. 65-66, N. Miklos; JA 599-600). It was the Government's theory that the cash checks were negotiated by others and that the cash was given to Petitioner Ristovski instead of the corporation.

An IRS agent testified at trial concerning his analysis of Petitioner's personal returns and computations of

unreported income for 1989 and 1990. According to the agent, the use of cash from the Mason checks for PSS corporate purposes reduced unreported income to amounts less than the total amounts of cash checks from Mason for 1989 and 1990 as follows: 1989 --$92,542 to $62,542; and 1990 -- $42,000 to $27,500. (Vol VIII, p. 122, Eadie; JA 1653; Gov't Exhibit 17c; JA 422).

Evidence at trial established that the cash checks were negotiated at Petitioner Ristovski's direction and that he received cash in some but not in all instances. (Vol V, pp. 46-47, Hyman; JA 1172-1173). Some of the cash was used to pay corporate debts and some cash went to Petitioner Ristovski's parents to repay loans. (Vol VI, pp. 48-49, Penny; JA 1354-55; Vol VIII, pp. 21-22, S. Kostovski; JA 1552-53; Vol VIII pp. 54, 57-58, 60, 73; JA 1585, 1588-89, 1591, 1604; 10/9/97 TR pp. 45-46, Eadie; JA 1728-29, Vol VIII p. 75, P. Ristovski; JA 1606). There was testimony that cash from the checks was deposited into a joint account held by Petitioner Ristovski and his parents and that money was taken from the joint account and put back into the business to pay expenses. (Vol VIII, pp. 53-54, P. Ristovski; JA 1584-85).

Petitioner Ristovski was 29 years old in 1989, a native of Yugoslavia, and without any formal business training or accounting experience. Petitioner Ristovski spent most of his time at work on the floor of the company with the machinery, leaving accounting matters to the company bookkeeper and CPA.

The company's bookkeeper was the Petitioner's live-in girlfriend, who was in her early twenties and had no prior accounting experience. (Vol VII, pp. 70-80, Penny; JA 1464-73). The company's CPA, John Golovitch was incompetent.

He was sued by the company. A default judgment was obtained against him for his failure to properly file payroll taxes. (Vol VII, p. 136, Golovitch; JA 1529). Golovitch was subpoenaed by the Government to testify at trial, but the Government was required to arrest him to obtain his presence in court. Golovitch eventually testified that because of his severe emotional problems going back to 1989, he had no recollection of any financial matters concerning PSS. (Vol VII, pp. 121-27, Golovitch; JA 1514-20). However, according to other trial witnesses, Golovitch told them that the cash from Mason checks did not have to be reported as corporate income if used for corporate purposes. (10/9/97 TR at 127-128; JA 1810-11).

Petitioner filed a pretrial motion to exclude evidence concerning the receipt of cash from Mason in 1988. The court overruled the motion and allowed the Government to introduce evidence concerning cash payments in 1988 to prove willfulness. Tax returns or tax computations for 1988 were not introduced as evidence during the trial.

At sentencing, the court included the 1988 Mason cash checks in the total amount of $105,000 to calculate Petitioner's tax loss pursuant to USSG §2T1.1. The court, however, refused to aggregate both personal and corporate tax loss amounts. On appeal, the court reversed on this issue and held that aggregation of corporate and personal loss amounts was required.

ARGUMENT FOR GRANTING THE WRIT

I. The Trial Court's Failure to Completely Instruct the Jury on the Willfulness Elements of 26 USC §7206(1) and 26 USC §7207, Excluding Instructions on How to Consider Evidence Favorable to the Defense, Deprived Petitioner of his Sixth Amendment Right to a Fair Jury Trial.

It was Petitioner Ristovski's defense at trial that he did not read or understand the details of his corporate tax returns and that he relied upon an inexperienced bookkeeper at his business and an incompetent accountant for preparation of his corporate tax returns. There was evidence at trial that Petitioner Ristovski successfully sued the accountant for negligence. (10/9/97 TR at 1115-1145; JA 1798-1817). In support of this defense, Petitioner Ristovski requested the Court to include the following as part of its instruction concerning the willfulness element of the charges against him:

> "mere negligence, inadvertence, mistake, a careless disregard for the truth, or even gross negligence is not sufficient to constitute willfulness".

(R 54, Petitioner Ristovski's Requested Jury Instruction # 24, JA 99). The court rejected the request and instead instructed the jury that "to act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness." (Jury Instruction Excerpt, App p. 34a). The instruction on willfulness followed instructions on the elements of 26 USC §7207 and made no reference to 26 USC §7206(1) or the false return charges.

Willfulness is an element of offenses charged pursuant to 26 USC §7206(1) and offenses charged pursuant to 26 USC §7207. United States v Bishop, 412 US 346; 93 S.Ct. 2008; 36 LEd 2d 941 (1973). The term willfulness is used to distinguish conduct which is intentional or done with a bad purpose from that which is accidental. United States v Murdock, 290 U S 389, 393; 54 S.Ct. 223, 225; 78 LEd 381 (1933). In our complex tax system, the word "willfully" is used to ensure that individuals are not penalized for "innocent errors". Spies v United States, 317 US 492, 496; 63 S.Ct. 364, 367; 87 LEd 2d 418 (1943).

It is the burden of the prosecution to prove that a defendant charged with filing false tax returns acted willfully, with "bad faith or evil intent". Murdock, supra at 398. Willfulness has also been defined to mean "a voluntary, intentional violation of a known legal duty. United States v Pomponio, 429 US 10; 97 S.Ct. 22; 50 LEd 2d 12 (1976). This court has consistently interpreted the word willfully to require an element of *mens rea* in order to implement "the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused mass of taxpayers". Bishop, supra. at 346 US at 359; 93 S.Ct. at 2016.

In Cheek v United States, 498 US 19; 111 S.Ct 604; 112 LEd 2d 617 (1991), this Court vacated convictions of a tax protester charged with failing to file tax returns and willfully attempting to evade income taxes. The court instructed the jury in Cheek, that in order to prove "willfulness", the Government must prove the voluntary and intentional violation of a known legal duty, a burden that could not be proven by showing mistakes, ignorance or negligence. Id. at 608. The court also instructed the jury "that an objectively reasonable, good faith misunderstanding

of the law would negate willfulness, but mere disagreement with the law would not". supra.

This Court disagreed with the Court of Appeals' requirement "that a good faith belief must be objectively reasonable . . . ", and noted that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision. supra at 611.

The trial court instructed Petitioner Ristovski's jury that "to act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." (Jury Instruction Excerpt, App 34a), but failed to instruct the jury "to consider evidence that might negate willfulness". Cheek, supra at 611. The instruction told the jury that "negligent conduct is not sufficient to constitute willfulness" (Jury Instruction Excerpt, App 34a), but failed to instruct the jury that "inadvertence, mistake, careless disregard for the truth, and gross negligence" does not constitute willfulness.

Each term in the rejected instruction was supported by evidence and would have supported Petitioner's closing argument to the jury. There was evidence to establish that Petitioner Ristovski lacked business sophistication, that his employee, Joan Penny, was an inexperienced, untrained bookkeeper, and that his accountant, John Golovitch, CPA was incompetent. Each of the terms rejected from Petitioner Ristovski's instruction request -- inadvertence, mistake, careless disregard for the truth and gross negligent -- represented aspects of Petitioner's theory of defense. The requested instruction should have been given to the jury not only because it set forth the theory of defense, Bird v United States, 180 US 356; 21 S.Ct. 403; 45 LEd 570 (1901), but

more importantly because it was essential in order to instruct the jury on its consideration of all evidence of willfulness.

II. Use of a Presumption Rather than Proof of a Tax Loss Amount for Uncharged Relevant Conduct Used to Increase Petitioner's Sentence Guideline Level Pursuant to USSG §2T1.1 denied Petitioner's Fifth Amendment Right to Due Process.

Petitioner Ristovski's sentence guideline level was increased based on a presumed tax loss for uncharged conduct. This was contrary to the constitutional rule in Apprendi v New Jersey, __ US __; 120 S.Ct. 2348; 147 LEd 2d 435 (2000). "If a fact is by law a basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement, it is an element". Id. at 2379 (Thomas, concurring). In Apprendi, this Court held that:

> "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Id. at 2363 , citing Almendarez-Torres v United States, 523 US 224, 252-253; 118 S.Ct. 1219; 140 LEd 2d 350 (1998). Racial motivation found by the judge in Apprendi, and used to increase the sentence beyond the statutory maximum, was not a mere sentencing factor; McMillan v Pennsylvania, 477

US 79; 106 S.Ct. 2411; 91 LEd 2d 67 (1986). Winship due process guarantees apply, to some degree, to sentence determinations. In re Winship, 397 US 358; 90 S.Ct. 1068; 25 LEd 2d 368 (1970); Almendarez-Torres, 523 US at 251.

Petitioner Ristovski's guideline level was increased based on presumptions instead of any fact, relieving the prosecution of its burden of proof and increasing the likelihood of inaccuracy in sentencing. Petitioner Ristovski was sentenced pursuant to USSG §2T1.1. That guideline requires a tax loss amount to fix a base offense level. Petitioner was convicted of violating 26 USC §7206(1) for filing false corporate returns for PSS for the years 1989 and 1990. On appeal, the court held that the loss amount for those years should include both the tax loss for the PSS corporate returns and the tax loss amount for Petitioner's personal returns. The tax loss amounts for 1989 and 1990 were less than the amount of Mason checks for these years because the prosecution accepted the Petitioner's theory of defense and reduced the totals by cash expenditures it was satisfied were used for corporate purposes. (Tax Computations, Exhibit 17c, App p. 36a). There was no similar computation for the 1988 year at trial because there was no criminal charge of a 1988 offense.

USSG §2T1.1(a) fixes a base offense level corresponding the tax loss. USSG §2T1.1, Application Note 1 provides that "although the definition of tax loss corresponds to what is commonly called the 'criminal figures,' its amount is to be determined by the same rules applicable in determining any other sentencing factor." Application Note 2 provides that the "total tax loss attributable to the offense" should include "all conduct violating the tax laws" which are "part of the same course of conduct or common scheme or plan unless the evidence

demonstrates that the evidence is clearly unrelated." USSG §1B1.3(a)(2) includes "all acts and omissions ... part of the same course of conduct or common scheme or plan as the offense of conviction".

The Government offered evidence of Mason cash checks for the year 1988 at trial but did not offer Petitioner's personal tax return, or a tax computation. The Government was allowed, however, to introduce the Mason cash checks for 1988 over Petitioner's pretrial objection of unfair prejudice.

For sentencing purposes, the court concluded that the total amount of Mason cash checks for 1988, $105,000, was all offense conduct. The court presumed there was a 1988 tax evasion offense by Petitioner pursuant to 26 USC §7206(1). The court also presumed a tax loss for 1988 using a 28% rate pursuant to USSG §2T1.1.

Some courts have used uncharged conduct to compute tax loss. In United States v Pierce, 17 F3d 146 (6th Cir., 1994) and in United States v Meek, 998 F2d 776 (10th Cir., 1993) the courts included tax loss amounts for years prior and subsequent to tax years charged in the indictment. The defendants were tax protestors who avoided paying taxes and failed to file annual tax returns. The courts included prior and subsequent years in computing the tax loss amounts because the defendants' failure to file tax returns and tax evasion were proof of a continuing pattern of violations. However, in United States v Daniels, 956 F2d 540 (6th Cir., 1992), the court rejected uncharged conduct represented to the court as a civil tax liability because "Daniel has had no opportunity to disprove the greater civil liability alleged by the government in Daniels pre-sentence report." Id. at 544. The court found "a lack of evidence of criminal behavior

regarding Daniels' tax liabilities" other than for the offenses of conviction. supra.

Because the Government relied on evidence of a continuing pattern of Mason cash checks at Petitioner Ristovski's trial, but omitted evidence of Petitioner's tax return or evidence of a tax computation for 1988, there was no proof of a tax violation for 1988. Tax evasion was presumed from evidence of Mason checks without regard for whether the money was used for corporate purposes or whether there was a tax due and owing. 26 USC §7201 provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title . . . shall . . . be guilty of an offense against the United States." Elements of the offense require proof of a substantial income tax due and owing in addition to that declared on a return, an affirmative attempt constituting evasion or attempted evasion and evidence that a Petitioner knowingly and willfully attempted to evade payment of the tax. Sansone v United States, 380 US 343; 85 S.Ct. 1004; 13 LEd 2d 882 (1965). A tax evasion offense by Petitioner was presumed and the burden was improperly shifted to the Petitioner to disprove it.

In Mullaney v Wilbur, 421 US 684; 95 S.Ct. 1881; 44 LEd 2d 508 (1975), this court rejected use of a presumption to establish a required element of proof and held a Maine murder statute unconstitutional which presumed the element of malice on proof of intent to kill resulting in death, subject to rebuttal by a defendant that he acted on provocation in the heat of passion which would reduce the offense to manslaughter. See also: Jones v United States, 526 US 227, 238; 119 S.Ct. 1215, 1223; 143 LEd 2d 311 (1999). The presumption in Mullaney relieved the prosecution of its burden to prove every element beyond a reasonable doubt. In Patterson v New York, 432 US 197; 97 S.Ct. 2319; 53 LEd

2d 281 (1977), this court held a New York murder statute valid which allocated to the defendant the burden of proving the affirmative defense of extreme emotional disturbance because, unlike Mullaney, the prosecution was not relieved of its burden to prove each essential element.

The sentencing court presumed a tax loss of $31,450 for 1988 and increased Petitioner's total tax loss for all years from $54,548 to $85,998. The presumption of a tax loss caused an increase in offense level pursuant to USSG §2T1.1 from level 11 to level 12. (1991 Edition). Petitioner's guideline range was enhanced 2 levels for obstruction of justice. USSG §3C1.1. His criminal score was II. Petitioner Ristovski's guideline range was, therefore, 18-24 months instead of 15-21 months. The finding of tax loss amount for the year 1988 based on a presumption increased punishment. Petitioner's sentence was in violation of Petitioner's right to due process.

III. The Court of Appeals Used Improper Double Counting by Aggregating Tax Loss Amounts for Tax Fraud Counts and Tax Evasion Counts on which the Petitioner was not Convicted to Compute Petitioner's Sentence Guideline Offense Level.

The Court of Appeals for the Sixth Circuit followed its prior decision in United States v Cseplo, 42 F3d 360 (6th Cir., 1994) to conclude that loss amounts for corporate tax returns should be aggregated with loss amounts for personal returns on which Petitioner was not convicted. The Second and Seventh Circuits have followed a different approach.

The holding in Cseplo is contrary to United States v Harvey, 996 F2d 919, 920-21 (7th Cir., 1993) which explicitly rejected the aggregation approach followed in

Cseplo, supra, because it overstates lost revenues to the government, because it amounts to double taxation in calculation of tax loss, and because it is unnecessary in order to carry out the punitive purposes of the Sentence Guidelines. The Harvey rationale has been followed in United States v Martinez-Rios, 143 F3d 662 (2nd Cir., 1998) and United States v Bove, 155 F3d 44 (2nd Cir., 1998).

The approach in Harvey, supra should be used to calculate tax loss when the same conduct implicates both personal and corporate returns in the same year. In Harvey, supra, the court suggested there are at least three possible ways to compute "tax loss" and used an illustration assuming a manager and principal shareholder of a corporation who sells some of the corporation's inventory producing $100,000 profit that he diverts to his own use. The three approaches each employ the 28% personal tax rate and 34% corporate tax rate in USSG §2T1.1:

> "(a) apply the 28% rate to the manager's income of $100,000, for a tax loss of $28,0000; (b) apply the corporate rate of 34% to the unreported profit of $100,000 and the personal rate of 28% to the unreported income of the same $100,000, for a tax loss of $62,000; (c) apply the corporate rate of 34% to the unreported profit of $100,000 and reduce the imputed dividend by the amount of imputed taxes, then apply the personal rate of 28% to the reduced dividend of $66,000, for a tax loss of $52,480. Method (c) assumes that the corporation, having paid $34,000 to the United States distributes as a "dividend" only $66,000, the after-tax profit."

Id. at 920.

Pursuant to Cseplo, the aggregate loss amount for Petitioner Ristovski including a tax loss amount for the uncharged year 1988 is $85,998. Harvey adopted the third approach, which if used, reduces Petitioner's loss amount to $76,654, including the 1988 amount; without the 1988 figure, the total is $45,204. The lower amount reduces Petitioner's Guideline range one level.

In Martinez-Rios, supra at 671, the court explained its rationale for rejecting Cseplo as follows:

> "The Guidelines are silent on this precise issue, and the two courts of appeals that have considered it have reached opposite conclusions. In Harvey, supra, the Seventh Circuit adopted the approach urged by Martinez, reasoning that the other method "over states the revenues lost to the Treasury." Harvey, 996 F2d at 921. In contrast, the Sixth Circuit in Cseplo, supra, employed the method used by the District Court here, based on its view that the Harvey method did not adequately account for the fact that two separate crimes -- personal tax evasion and corporate tax evasion-- were committed. See Cseplo, 42 F3d at 364. We agree with the Seventh Circuit's approach, primarily because it bases the calculation on a better approximation of the tax revenue lost to the federal treasury. Although, as we have acknowledged, the 1991 Guidelines do not call for a tax loss calculation based exclusively on the amount of tax liability that the defendant

> would have incurred had he reported his income truthfully, we think that the 1991 Guidelines' punitive purposes are adequately served by denying defendants the benefit of legitimate but unclaimed deductions. Though the tax law imposes a tax on income received by a corporation and a second tax on income distributed by the corporation to shareholders, we do not think the framers of the 1991 Guidelines intended to exacerbate the double taxation phenomenon by computing shareholders' tax losses without regard to the corporate taxes that their corporations were obliged to pay, at least in circumstances where the shareholders are being punished for their share of the unpaid corporate taxes. Thus, on remand, the District Court should recalculate Martinez's personal tax loss after allowing a deduction for the corporate tax."

This Court should resolve the circuit conflict and follow Harvey, supra, and Martinez-Rios, supra, because the guidelines are silent on this issue and because it results in a "better approximation of the tax revenue lost to the federal government". Id. At 671.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to each question raised.

Respectfully Submitted,

GUREWITZ & RABEN, PLC

By: _____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed April 18, 2000]

No. 98-1749/1868

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
LJUPCO RISTOVSKI,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: **MERRITT, NELSON**, and **DAUGHTREY**, Circuit Judges.

DAVID A. NELSON, Circuit Judge. Ljupco Ristovski was convicted on two felony counts of subscribing false corporate tax returns in violation of 26 U.S.C. § 7206(1) and eight misdemeanor counts of submitting false documents to the

Internal Revenue Service in violation of 26 U.S.C. § 7207. Sentenced to concurrent terms of imprisonment, the longest of which was 18 months on the felony counts, he has appealed his convictions and sentences. The United States has cross-appealed, contending that the district court erred in favor of Ristovski in its application of the sentencing guidelines.

We find no basis for reversing the convictions. We think there were probably errors on both sides of the ledger in the calculation of the defendant's sentencing range under the guidelines, but the errors cancelled one another out; the range actually used in sentencing was identical to what it would have been had there been no errors. Accordingly, we shall affirm both the convictions and the sentences.

I

Ristovski was the president of Precision Steel Shearing Company, a small business that cut steel to its customers' specifications. The steel-cutting process produced scrap that was sold to a company known as Mason Iron & Metal.

As a service to its customers, Mason would sometimes make advance payments for scrap that was to be delivered in the future. Mason was willing to make these advances in the form of checks made out to cash. Mason was also willing to break down advances of more than $10,000 into several smaller checks, thus making it possible to circumvent IRS reporting requirements for cash transactions of more than $10,000.

Through Ristovski, Precision arranged to receive numerous advances from Mason. Many were in the form of checks (or multiple checks) made payable to cash. Ristovski

cashed a number of these checks himself, and he asked other employees or family members to cash the rest. Whoever cashed the checks generally returned the proceeds to Ristovski, but occasionally would be instructed to use some of the money to buy items for the business.

Precision's activities came to the attention of the IRS during an audit of Mason. After a preliminary investigation into Precision's records, the IRS began a formal audit of Precision. It soon became apparent that a sizable portion of the cash received via the Mason checks in 1988, 1989, and 1990 had not been accounted for as corporate income. Neither was the money included as income on Ristovski's personal tax returns.

As the audit was getting underway, a break-in and theft allegedly occurred at Precision's plant. Whether fortuitously or otherwise, most of the items that turned up missing were materials needed for the audit.

In the face of the loss of Precision's records, Ristovski contacted Chris Formosa, a mechanic who serviced the company's vehicles, and had him create replacement invoices to show what work Formosa had done for the company and what he had been paid. The recreated records, which were turned over to the IRS, were based for the most part on Formosa's memory, augmented with suggestions from Ristovski himself. The documents were clearly marked as replacements; there was no attempt to misrepresent them as original records.

Other documentation was available to show that some of the cash taken by Ristovski and members of his family had represented repayment of loans previously made by them to the

company. Much of the cash from the Mason checks, however, could not be traced to any corporate use.

Precision's books were kept by Joan Penny, Ristovski's girlfriend at the time, who worked as the office secretary and had no prior bookkeeping experience. She knew of the cash advances from Mason, and she claimed to have expressed concern about them to Ristovski.

The company's tax returns were prepared by John Golovich, an accountant. Golovich apparently had serious personal or psychological problems, as a result of which he disclaimed any recollection of the events at issue in the trial. Precision has since sued Golovich for malpractice and has recovered a default judgment against him.

In 1996, as an upshot of the IRS audit, Ristovski was indicted on 12 counts. Counts I and II of the indictment charged him with willfully attempting to evade personal income tax, in violation of 26 U.S.C. § 7201, by filing false individual tax returns for 1989 and 1990. Counts III and IV charged him with subscribing false corporate returns, a violation of 26 U.S.C. § 7206(1), for the same years. Counts V through XII charged him with submitting false documents (the Formosa replacement records) to the IRS on August 8, 1995, in violation of 26 U.S.C. § 7207.

After the case was tried and submitted to the jury, the court accepted a partial verdict when the jury reported that it had reached a unanimous decision on Counts III through XII. The verdict proved to be "guilty" on each of these counts. The jury then deliberated further on Counts I and II, but was eventually

discharged because it could not reach a unanimous decision. Counts I and II were later dismissed.

At sentencing, the court overruled an objection by the government to a recommendation in the presentence investigation report that the tax loss from the false corporate returns not be aggregated, for purposes of applying the guidelines, with the tax loss from Ristovski's individual tax returns. The court also sustained an objection by Ristovski to the criminal history category assigned him in the report; contrary to the recommendation of the probation officer who prepared the report, the court declined to give effect to two prior misdemeanor convictions on Ristovski's record, thereby placing him in Category I rather than Category II. Using the 1997 edition of the sentencing guidelines (an edition identical, in all relevant aspects, to the 1994 edition that was in effect at the time of the misdemeanor offenses charged in Counts V through XII), the court then imposed concurrent sentences of 18 months for Counts III and IV and 12 months for the remaining counts. Ristovski's appeal and the government's cross-appeal followed.

II

A. Sufficiency of the Evidence

1. Sufficiency of the Evidence as to Signing to False Returns

At the close of the evidence, Ristovski moved for a judgment of acquittal on the ground that the evidence was insufficient to support a conviction. The motion was denied.

Appellate review of the denial of such a motion is conducted *de novo*. See *United States v. Gibson*, 675 F.2d 825, 829 (6th Cir.), *cert. denied*, 457 U.S. 972 (1982). The reviewing court must ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This does not involve weighing the evidence or judging the credibility of witnesses. See *Gibson*, 675 F.2d at 829.

To prove a violation of 26 U.S.C. § 7206(1), the government must demonstrate that (1) the defendant willfully made and subscribed a tax return that was (2) signed under penalties of perjury and (3) the defendant did not believe the return to be true and correct as to every material matter. See *United States v. Bishop*, 412 U.S. 346, 350 (1973). Challenging the adequacy of the government's proofs with respect to the element of willfulness in signing and filing the false returns prepared by Golovich, Ristovski argues that he lacked formal education and that he conducted the financial aspects of his business freely mixing personal and business assets in accord with his "old world" background. (He had immigrated to the United States from Yugoslavia at the age of 9.) He also maintains that his management of the company focused on operations in the shop and that he remained largely ignorant of the company's finances. He naively trusted Penny and Golovich to keep accurate records, he says, and had no idea that anything was amiss when he signed the returns in question. The jury, obviously, disagreed.

For purposes of section 7206, willfulness has been defined as a "voluntary intentional violation of a known legal

duty." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). The government is permitted to prove willfulness -- a state of mind that entails more than a careless disregard for the truth -- through the surrounding facts and circumstances. See *United Stares v. Barnes*, 313 F.2d 325, 327 (6th Cir. 1963). Facts and circumstances relevant in this connection include the extent of the defendant's knowledge about the income and revenues of the business and the role played by the defendant in the business operations. See *United States v. Mohney*, 949 F.2d 1397, 1406 (6th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

In the case at bar the evidence did indicate that Ristovski spent a considerable amount of time in the shop. There was also ample evidence, however, that he took an active role in the financial affairs of the business as well. It was Ristovski who, working with a man named Michael Duerr of Mason Iron & Steel, made the arrangements for the advances and for the checks payable to cash. After the initial deal was made, Ristovski would often call Duerr seeking an advance and would instruct Duerr as to the amount he wanted on each check. Ristovski would either pick up the checks and cash them himself or would instruct someone else to do so. When others cashed the checks, they always returned the money to Ristovski or made purchases at Ristovski's instruction.

Ristovski claims that he arranged for checks payable to cash in order to prevent his father (who acted as corporate treasurer) from learning how Precision was spending the money. The father cashed some of the Mason checks, however, and turned the proceeds over to the son. The younger Ristovski had become a signatory on the corporate account in 1987, moreover -- before the arrangement with Mason was established -- and it

was unnecessary for him to obtain his father's approval on corporate expenditures.

Defendant Ristovski's involvement in the financial aspects of the business is also evident from the fact that he kept track of how much money Precision owed to others and how much others owed Precision. He often asked Ms. Penny whether particular funds had been received or particular bills had been paid. Ristovski also orchestrated other financial transactions for the business, such as the purchase and refinancing of property. Further, there was evidence that both Penny and Golovich warned him of the danger of misusing the cash received from Mason.

The jury, in short, heard ample testimony to the effect that Ristovski played an active and sentient role in the financial operations of the business. Under the circumstances presented here, this was more than enough to sustain the denial of his motion for acquittal. See *Mohney,* 949 F.2d at 1406. The evidence did not have to exclude every reasonable hypothesis except that of guilt. See *United States v. Reed,* 821 F.2d 322, 325 (6th Cir. 1987).

2. Sufficiency of the Evidence as to Submitting False Documents

The misdemeanor charges against Ristovski for submitting false documents were based on the delivery to the IRS of the replacement invoices created by Chris Formosa. A violation of 26 U.S.C. § 7207 occurs when a person willfully discloses to the IRS any documents that the person knows to be false as to any material matter. See 26 U.S.C. § 7207. See also *Sansone v. United States,* 380 U.S. 343 (1965).

Ristovski argues that the evidence did not show a violation of this section because he had a legitimate reason -- the alleged break-in and theft -- for giving the IRS replacement invoices; he informed the IRS of this reason; the documents clearly indicated that they were replacements rather than originals; and the IRS was not deceived. Furthermore, according to Ristovski, he did not give the documents to the IRS (his sister did), and he did not otherwise authorize their disclosure. Finally, Ristovski argues that the documents were not "material" inasmuch as the payment of cash for corporate expenses had nothing to do with the false corporate tax returns.

These arguments are not without flaws. Although the replacement invoices were given to the IRS agent by Ristovski's sister, for example, the jury was entitled to find that she was acting as his attorney at the time, just as it could find that Ristovski himself had instructed Formosa to create the new documents with a view to their delivery to the IRS. Moreover, Ristovski arranged for new documents to be created even where some original paperwork was available. (The original paperwork was later taken from Formosa in a drug raid.) Formosa -- who apparently owed Ristovski money at the time in question -- testified that the documents were reconstructed largely from memory, although he did rely to some extent on existing receipts for items he had bought for use in making repairs to Precision's vehicles. He admitted to simply making up some figures to suit Ristovski's needs, and he testified that the numbers given were merely guesstimates. The IRS, for its part, was unable to substantiate the payments reported in the replacement documents.

Given, as we have said, that our task is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt," see *Jackson,* 443 U.S. at 319, we conclude that Ristovski's conviction for submission of false documents must be affirmed. The argument regarding materiality does not persuade us otherwise. Contrary to what Ristovski suggests, the documents need not have been relevant to the tax evasion. These documents probably had such relevance, in our view, but the law only requires that the falsities be material to the documents themselves. See 26 U.S.C. § 2707. Here the documents set forth amounts -- and perhaps entire transactions -- that were fictitious. This would certainly be material to any reconstructed invoice.

B. Lack of "Willfulness" Jury Instruction

Ristovski argues that the alleged insufficiency of the evidence as to his willfulness in subscribing the false corporate returns was exacerbated by the court's failure to give a requested jury instruction as to the meaning of "willfulness" in this context. Refusal to give a jury instruction is reversible error if:

> "(1) the omitted instructions are a correct statement of the law; (2) the instruction is not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the requesting party's theory of the case. It is only when the instructions given, viewed as a whole, are misleading, that a reversal of judgment is warranted." *Sutkiewicz v. Monroe County Sheriff,* 110 F.3d 352, 361 (6th Cir. 1997).

Although the trial court refused to give the requested instruction on willfulness with respect to the corporate tax

returns, the court did instruct the jury that, as to all the counts, the "Government must prove beyond a reasonable doubt that the Defendant acted willfully. To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. Negligent conduct is not sufficient to constitute willfulness." This differed from Ristovski's proposed instruction only in the last sentence, where Ristovski asked for this formulation: "Mere negligence, inadvertence, mistake, a careless disregard for the truth, or even gross negligence is not sufficient to constitute willfulness." We believe that the requested instruction was "substantially covered by other delivered charges," and the instructions as given clearly applied to the corporate tax return counts. Viewed as a whole, the instructions were not misleading.

C. Multiplicity of Counts for Submission of False Documents

Ristovski maintains that the eight misdemeanor counts based on the submission of the recreated invoices were multiplicitous. An indictment offends the rule against multiplicity when it charges one criminal offense in several counts. See *United States v. Hart,* 70 F.3d 854, 859 (6th Cir. 1995), *cert. denied,* 517 U.S. 1127 (1996). Here the documents were all submitted to the IRS together, arguably giving rise to only one offense. But Ristovski did not raise the multiplicity issue prior to trial, and he thus waived any claim that the indictment should be dismissed on that ground. See *id.* at 860 (citing Rule 12(b)(2), Fed. R. Crim. P.), and *United States v. Colbert,* 977 F.2d 203, 208 (6th Cir. 1992).

As far as sentencing is concerned, we note that Ristovski's 12-month sentences for the misdemeanors are to be

served concurrently. This being so, it makes no practical difference whether the counts were multiplicitous or not. Furthermore, Ristovski raised this issue in a footnote only. An argument raised in this manner merits little, if any, attention. See *Becherer v. Merrill Lynch, Pierce, Fenner & Smith,* 43 F.3d 1054, 1058-59 (6th Cir.), *cert. denied,* 516 U.S. 912 (1995).

D. Evidentiary Rulings

1. Evidence as to Money Received in 1988

Because he was not charged with tax evasion for 1988, Ristovski argues that the trial court erred in declining, as it did, to exclude evidence of the amount of money Precision received from Mason in 1988 in the form of checks payable to cash. Because the 1988 receipts were part of the same tax evasion scheme as that charged, however, the evidence was admissible as "intrinsic" to the charged conduct. The evidentiary rule on which Ristovski's relies -- Rule 404(b), Fed. R. Evid. -- need not be applied here. See *United States v. Barnes,* 49 F.3d 1144, 1149 (6th Cir. 1995). And even under Rule 404(b), which was considered by the district court in denying Ristovski's motion *in limine* on this matter, the evidence was admissible to show willfulness. See *United States v. Ausmus,* 774 F.2d 722, 727-28 (6th Cir. 1985). In addition, an appropriate limiting instruction was given. We see no basis for a reversal on this point.

2. Information on Cash Transaction Reporting Requirement

Ristovski complains that the government should not have been allowed to introduce evidence that the IRS requires banks to file reports for cash transactions involving more than $10,000

and should not have been allowed to bring out the fact that Ristovski directed that checks totaling more than $10,000 be cashed at different bank branches. Again, however, this information was relevant under Rule 404(b) as indicative of willfulness.

3. Testimony by Joan Penny

Ristovski argues that Joan Penny should not have been allowed to testify that she told Ristovski to plead guilty and that he refused because the government would not offer him less than a felony conviction. This testimony, he says, was gratuitous and vindictive.

A cautionary instruction was given, however, and Ms. Penny's testimony does not seem particularly damning in context. She had made it clear to Ristovski that she did not want to become involved in the litigation, and her testimony could easily be read to mean that she asked him to plead guilty in order to keep her out of the matter. Any error, we believe, was harmless.

Ms. Penny also testified that Ristovski was subject to a restraining order as a result of having threatened to kill everyone in Penny's house. No objection to this testimony was made, so it can be reviewed for plain error only. See *United States v. Kelly*, ___ F.3d ___, 2000 U.S. App. LEXIS 2696 (6th Cir. 2000). Given the context of the statement -- establishing the current extent of contact between Penny and Ristovski – no plain error is evident. Moreover, the jury already knew that Penny and Ristovski were no longer on amiable terms and that Ristovski had a violent temper. Her testimony added little to the story.

4. Impeachment of Formosa by the Government

Ristovski complains that the court erred in allowing the government to impeach Chris Formosa, its own witness. This impeachment occurred when the government showed that Formosa has a conviction on his record, that he was interviewed by the IRS while in jail, and that belongings he kept in his employer's garage had been subject to a search by the Drug Enforcement Administration.

Any party is allowed to impeach a witness, even the party calling the witness. See Rule 607, Fed. R. Evid. Formosa's credibility was at issue because of his testimony regarding the validity of the replacement documents he created for Ristovski. In addition, his presence in jail, and the DEA raid, helped explain why he did not know where his original paperwork was at the time of trial. We reject this assignment of error.

E. Acceptance of Partial Jury Verdict

After more than six hours of deliberation, the jury informed the court that it had reached a unanimous verdict as to Counts III through XII. Defense counsel objected to the receipt of a partial verdict, urging that in further considering Counts I and II the jury might reconsider the other counts. The court nonetheless elected to receive the partial verdict. After deliberating further, the jury then asked the court this question: "Will our verdict on Counts III through XII stand if we are hung on Counts I and II?" Ristovski argues that this confirms that the jury did not understand the consequences of a partial verdict and might have reconsidered its decision as to Counts III through XII had it been able to.

Whether to accept a partial verdict is left to the sound discretion of the trial court. See *United States v. Benedict,* 95 F.3d 17, 19 (8th Cir. 1996). No abuse of that discretion is evident here, where the court gave the jury the option of continuing deliberations on all counts or proceeding with a partial verdict on the decided counts. The jury's subsequent note can reasonably be interpreted as seeking reassurance that being hung on two counts -- which would lead to a mistrial -- would not negate the verdict already rendered on the other counts.

There was no inconsistency, moreover, in finding the defendant guilty on Counts III through XII but not on Counts I and II. Further deliberations on Counts I and II did not necessarily require reconsideration of the other counts so as to make a partial verdict inappropriate. *Cf. Benedict,* 95 F.3d at 20.

F. Sentencing Issues

1. Use of the 1997 Guidelines

The presentence investigation report which was largely followed by the district court in sentencing Ristovski used the 1997 edition of the sentencing guidelines, the edition that was expected to be in effect at the time of sentencing. See 18 U.S.C. § 3553 and U.S.S.G. § 1B1.11(a). At the sentencing hearing the court observed that the 1994 edition was applicable to Ristovski, this having been the edition in effect in 1995 when the misdemeanors were committed. The court noted, however, that the 1997 edition was identical to the 1994 edition insofar as the relevant sections were concerned.

Ristovski argues that the 1991 edition of the guidelines should have been used, his felony convictions having been based on the subscription of tax returns for 1989 and 1990. These crimes occurred prior to 1993 guideline amendments that increased sentencing offense levels for corporate tax evasion. The increase, in Ristovski's case, came to two levels.

It seems to us that Ristovski's argument has considerable force, notwithstanding the "one book" rule embodied in U.S.S.G. § 1B1.11(b)(2) and notwithstanding the role that in general requires the use of an amended edition of the guidelines when a defendant has been convicted of one offense committed before the amendment and one committed afterwards. U.S.S.G. § 1B1-11(b)(3). See *Miller v. Florida,* 482 U.S. 423 (1987), where the *Ex Post Facto* Clause of the United States Constitution was held to bar retrospective application of an amendment in a state sentencing scheme. The *Miller* amendment was one that substantially disadvantaged the defendant, whose crime had been committed before the amendment was adopted; the Court declined to let the amendment be applied notwithstanding that the state statute had from the beginning warned of future amendments.

Ordinarily, as explained in the Background section of the Commentary accompanying U.S.S.G. § 1B1.11 (1997 ed.), *ex post facto* considerations pose no bar to application of the guidelines as written (*i.e.,* to use an amended edition) in situations where, as here, at least one of a series of offenses was committed after the amendment had become effective. This is so, basically, because relevant conduct involving the earlier offense or offenses can properly be taken into account in fixing the punishment for the post-amendment offense or offenses. In the instant case, however, the post-amendment offenses were

misdemeanors for which the maximum term of imprisonment authorized by statute -- 12 months -- was the sentence actually imposed by the court. Under these circumstances it is not readily apparent to us how the commission of misdemeanors after the 1993 amendment could properly be used to ratchet up the sentence for felonies committed before the amendment. For purposes of this appeal, in any event, we shall assume that Ristovski should have been sentenced under the 1991 edition of the guidelines.

2. Use as Relevant Conduct of Uncharged Violations Involving 1988 Returns

Ristovski takes issue with the district court's use of tax violations associated with the 1988 returns, which were not included in the indictment, in determining the tax loss under the sentencing guidelines. His complaint is not with the use of uncharged relevant conduct as such, see *United States v. Pierce,* 17 F.3d 146, 150 (6th Cir. 1994), but with the use of the full amount ($105,000) received from Mason in 1988 in the form of checks payable to cash. Ristovski argues that he had no way to rebut this figure, the bank records from 1988 no longer being available. Citing *United States v. Silverman,* 976 F.2d 1502, 1506 (5th Cir. 1991), *cert. denied,* 507 U.S. 990 (1992), he contends that none of the $105,000 should have been included. At the very least, he asserts, $60,000 of the Mason advances was used to refinance Precision's real property, and this and other legitimate expenses should have been deducted from the $105,000.

We are not persuaded. It is clear from testimony throughout the trial that numerous records from 1988 were available. These showed that no deposits of the proceeds of

Mason checks payable to cash were made to the corporate account or otherwise picked up as corporate income. As to the refinancing, the property in question was titled in the name of Ristovski's sister, not in the name of the company. After the refinancing, the company paid rent to the sister. The $60,000 thus cannot count as an expense for the business. Other items pointed to by Ristovski are not supported in the record either.

3. Failure to Aggregate Tax Loss from Personal Tax Evasion

The government argues here, as it did at the sentencing hearing, that the tax loss used to determine Ristovski's base offense level should have included both the loss from his personal tax evasion ($55,384) -- a loss supported by a preponderance of the evidence, notwithstanding the absence of a conviction -- and the loss resulting from the false corporate tax returns ($33,062), for an aggregate loss of $88,446. This figure would have resulted in a base offense level of 12, under the 1991 guidelines, rather than 11.

The sentencing court refused to aggregate the losses. The court used only the $55,394,[1] expressing some concern that to do otherwise might constitute double counting, the same money not having been reported on either the personal or corporate returns. But in *United States v. Cseplo*, 42 F.3d 360 (6th Cir. 1994), a case with facts nearly identical to those presented here, we held

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[1] For reasons not clear from the record, Ristovski was sentenced on the amount or tax loss from his personal tax evasion rather than the amount from the corporate tax evasion. He has not raised this issue on appeal.

that the personal tax loss and the corporate tax loss must be aggregated. See *Cseplo*, 42 F.3d at 364-65. That precedent is controlling in the instant case. The losses should have been aggregated, thereby raising the offense level by one.

4. Exclusion of Misdemeanors In Determining Criminal History Category

In determining Ristovski's criminal history category, the presentence investigation report counted two previous misdemeanor convictions. One was for assault and battery and the other for driving with a revoked license. The court sustained Ristovski's objection to the use of these convictions, thereby reducing his criminal history category from Category II to Category I.

In support of his objection, Ristovski argued that (1) there was inadequate documentation of the convictions; (2) there was no proof that Ristovski had been represented by counsel when he pleaded guilty; and (3) as to the revoked license offense, his sentence did not meet the requirements of U.S.S.G. § 4A1.2.

The district court sustained the objection on the ground that the government could not show that Ristovski had been represented by counsel. The Supreme Court, however, has stated that the burden of proof as to the presence of counsel is properly placed on the defendant. See *Parke v. Raley,* 506 U.S. 20, 30-31 (1992). The district court should have presumed the validity of the convictions unless adequately rebutted by the defendant. See *United States v. McGlocklin*, 8 F.3d 1037, 1043 (6th Cir. 1993), *cert. denied,* 511 U.S. 1054 (1994). See also *United States v. Cordero,* 42 F.3d 697, 701 (1st Cir. 1994), *United States v. Ruo,* 943 F.2d 1274, 1276 (11th Cir. 1991), and

United States v. Gallman, 907 F.2d 639, 643 (7th Cir.), *cert. denied*, 499 U.S. 908 (1991). Moreover, the probation officer testified that she verbally confirmed with the relevant state courts that their records indicated that Ristovski had been represented by counsel.

Ristovski's argument as to the lack of documentation has little merit. Although copies of the judgments were not provided, it is clear that Ristovski's counsel had paperwork regarding at least one of the convictions -- he referred to it when arguing about Ristovski's sentence in the driving-with-revoked-license incident. Furthermore, the probation officer testified that she verified the convictions and that the courts had microfiche records of the incidents.

As to Ristovski's final argument, U.S.S.G. § 4A1.2 provides that driving-with-revoked-license offenses are counted in a criminal history "only if (a) the sentence was a term of probation of at least 1 year or a term of imprisonment of at least 30 days. . . ." U.S.S.G. § 4A1.2(c)(1) (1991). The application note to this section explains that if a defendant receives a sentence that allows him to elect a fine or other non-incarcerative punishment as an alternative to incarceration, the sentence is deemed not to have entailed incarceration at all. See U.S.S.G. § 4A1.2(c)(1) comment, (n.4). In his objections to the presentence report, Ristovski argued that he received such an elective sentence and that the conviction should therefore not be counted.

This argument -- which essentially concedes the existence and validity of the conviction -- is incorrect as to the sentence's terms. It became evident at the sentencing hearing that the sentence for the licensing offense entailed a fine of $100, costs

of $205, *"and* 30 Days or 60 Days in Macomb County Jail." (Emphasis added.) Ristovski was given 30 days' incarceration with release for work. His sentence thus qualified under § 4A1.2.

In sum, we conclude that the sentencing court should not have sustained Ristovski's objection on the ground it did. Ristovski's alternative arguments as to why the court's decision was correct have no merit. He should have been placed in Criminal History Category II.

Had this been done, and had the sentencing court used the 1991 guidelines and aggregated the tax losses, the guideline range for the felony counts would have been 18-24 months. This, as it happens, is precisely, the range that was used. Accordingly, we see no record for a remand.

Both the convictions and the sentences are **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed July 25, 2000]

No. 98-1749/1868

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee/	)
Cross-Appellant,	)
	)
v.	)
	)
LJUPCO RISTOVSKI,	)
Defendant-Appellant/	)
Cross-Appellee.	)
	)

ORDER

BEFORE: MERRITT, NELSON, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

JURY INSTRUCTIONS EXCERPT

[pp. 1844-1856]

* * *

. . . possible guilt of others influence your decision in any way.

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to the other offenses charged.

The Defendant has pled not guilty to each of the charges contained in the indictment. A not guilty plea puts in issue each of the essential elements of the offenses as will be described in these instructions and imposes on the prosecution the burden of establishing each of these elements by proof beyond a reasonable doubt.

Counts 1 and 2 of the indictment charge that the Defendant willfully attempted to evade and defeat the payment of a large amount of income tax due and owing by him to the United States in 1989 and 1990, in violation of Section 7201, Title 26, United States Code. Counts 1 and 2 of the indictment read.

Section 702 -- I'm not going to read that indictment to you at this point. There will be a copy of the indictment in here.

Remember, at all times, that the indictment is merely the formal charge.

Well, maybe I should read it to you. I don't think anybody has read it to you, so let me read it to you.

Count 1:

> "On or about February 13, 1990, in the Eastern District of Michigan, the Defendant, a resident of Sterling Heights, Michigan, did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calender year 1989, by filing and causing to be filed with the Director, Internal Revenue Service Center, at Cincinnati, Ohio, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, wherein he stated that his taxable income for the calender year 1989 was the sum of $4,793.17 and that the amount of tax due and owing was the amount of $716, whereas, as he well knew and believed, his taxable income for the calender year was the approximate sum of $83,639, upon which taxable income there was approximately $22,944 owing to the United States of America as income tax; in violation of Title 26, United States Code, Section 7201."

Count 2 states:

> "On or about February 18, 1991 in the Eastern District of Michigan, that the Defendant,

> a resident of Sterling Heights, did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calender year 1990, by filing and causing to be filed with the Director, Internal Revenue Service Center, at Cincinnati, Ohio, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, wherein he stated that his taxable income for the calender year 1990 was the sum of $14,748.13 and that the amount of tax due and owing thereon was the sum of $2,209, whereas, as he well new and believed, his taxable income for the calender year was the approximate sum of $65,962, upon which taxable income there was the approximate sum of $16,886 owing to the United States of America in income tax; all in violation of"

the same section which I have just indicated to you.

In section, section 7201 of Title 26 of the United States Code provides, in pertinent part, that:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title . . . shall . . . be guilty (of an offense against the United States)."

Elements of attempt to evade or defeat a tax.

To establish the offense of attempting to evade the payment of a tax, the Government is required to prove beyond a reasonable doubt the following three elements:

Jury Instructions Excerpt

First, a substantial income tax was due and owing from the Defendant in addition to that declared on his tax return;

Second, an affirmative attempt, constituting evasion or attempted evasion; and

Third, the Defendant knowingly and willfully attempted to evade payment of the tax.

The Government must prove beyond a reasonable doubt that the Defendant wilfully attempted to evade or defeat a substantial portion of tax. The Government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of additional taxes owed.

The phrase "attempts in any manner to evade a tax" involves two things: First, the formation of an intent to evade a tax; and, second, willfully performing some act to accomplish the intent to evade payment of the tax.

The phrase "attempts in any manner to evade payment of a tax" contemplates and charges that the Defendant knew and understood that during the calender years charged -- year charged in the indictment, he owed substantially more federal income tax than was declared on the Defendant's federal income tax return for those years and then tried in some way to avoid the tax.

In order to show an "attempt[s] in any manner to avoid payment of a tax," therefore, the Government must prove beyond a reasonable doubt that Defendant intended to evade or defeat the tax due, and that the Defendant also willfully did some affirmative act in order to accomplish this intent to evade the tax.

Jury Instructions Excerpt

Counts 3 and 4 of the indictment charge that the Defendant willfully made and subscribed to corporate tax returns that he did not believe to be true and correct as to every material matter. The indictment reads:

And I'll read Count 3 for you.

> "On or about April 16, 1990, in the Eastern District of Michigan, Defendant, a resident of Sterling Heights, did willfully make and subscribe to a U.S. Corporation Income Form 1120 for the Precision Steel Shearing Company, Inc., for the calender year of 1989 and declared under penalty of perjury that the return was true, correct and complete to the best of his knowledge and belief, and which return was filed with the Director of Internal Revenue Service Center at Cincinnati, Ohio; whereas, the Defendant did not believe the return to be true and correct as to every material matter, in that, Defendant well knew and believed the return did not include approximately $62,000 in income returned in 1989 from the Mason Iron and Metal Company, all in violation of Title 26, United States Code, Section 7206 (1).

Count 4 of the indictment states as follows:

> "On or about October 16th, 1991, in the Eastern District of Michigan, Defendant, a resident of Sterling Heights, Michigan, did willfully make and subscribe a U.S. Corporation Income Tax Return Form 1120 for Precision Steel

> and Metal Company, Inc., for calender year 1990, and declared under penalty of perjury that the return was true, correct and complete to the best of his knowledge and belief, and which return was filed with the Director of Internal Revenue Service Center at Cincinnati, Ohio; whereas, Defendant did not believe the return to be true and correct as to every material matter, in that, Defendant well knew and believed that the corporate income tax return did not include approximately $38,000 in income received in 1990 from the Mason Iron and Metal Company, all in violation of" the same section and title of the United States Code.

The relevant statute on this subject is Section 7206 (1) of Title 26 of the United States Code, which provides in pertinent part as follows:

> "Any person who . . . willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of an offense against the United States."

To prove a violation of Section 7601 (1), the Government must establish each of the following four elements beyond a reasonable doubt:

Jury Instructions Excerpt

1. The Defendant made, or caused to be made, and signed an income tax return for the year in question that was false as to a material matter;

2. The return contained a written declaration that it was made under the penalties of perjury;

3. The Defendant did not believe the return to be true ant correct as to the material matters charged in the indictment; and

4. The Defendant made, or caused to be made, and signed the return willfully.

The word "subscribe" simply means the signing of one's name to a document.

"The fact that an individual's name is signed to a return . . . shall be prima facie evidence for all purposes that the return . . . was actually signed by him," which is to say that, unless and until outweighed by evidence in the case -- excuse me -- which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that Defendant signed the tax return, that is evidence from which you may, but are not required to, find or infer that Defendant had knowledge of the contents of the return.

In order to find the Defendant guilty of subscribing to a false tax return, you must decide that the return was false as to a material matter. A matter is material if it is essential to the accurate computation of the taxpayer's taxes or has the potential

to influence or impede the internal Revenue Service in determining the amount of tax due.

You are instructed that in proving that the Defendant violated Section 7206 (1), the Government does not have to prove that there were any additional taxes due and owing by the corporation for the years in issue or that the Government was deprived of any tax revenues.

The good faith of the Defendant is a complete defense to the tax charges of the indictment because good faith is simply inconsistent with willfully violating these Internal Revenue Service laws.

While the term "good faith" has no precise definition, it means, among other things, an honest belief, lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because that honest belief turns out to be incorrect or wrong. The tax laws subject to criminal punishment only those people who willfully violate these laws.

The burden of proving good faith does not rest with the Defendant because the Defendant has no obligation to prove anything to you. The Government has the burden of proving to you beyond a reasonable doubt that the Defendant acted willfully.

Counts 5 through 12 charged that the Defendant willfully caused false documents to be delivered to the Internal Revenue Service, which documents were known by Defendant to be false as to material matters.

Let me read at least some of those to you. I will read Count 5, which alleges that:

> "On or about August 8, 1995, in the Eastern District of Michigan, that the Defendant did willfully cause to be delivered a document, known by him to be false as to a material matter, in that, Defendant caused to be delivered to Timothy Murphy, an attorney with the IRS District Counsel's office and a representative of the Secretary of the Treasury, an invoice from CC Auto and Truck Repairs to Precision Steel Company, dated May 9, 1989, indicating that certain repairs in the total amount of $4,029 had been made to a company truck and for which repairs Defendant had paid in full with cash which voice Defendant knew to be false; all in violation of Title 26, United States Code, Section 7207."

And the next one, which is Count 6, alleges that on or about August 8, 1995, the same day, and references other invoices. And again, rather than just sitting here reading, I think you can read each one when you are in the jury room.

Count 7, again, alleges a similar kind of violation, but again with more specificity. And that one is another bill and another date and so on and so forth. Rather than taking the time to read it to you, you will have a copy.

And always keep in your mind that as you read the indictment in this matter, that it is only a charge. It is not by any means any proof in this matter. It is only the formal charge.

The relevant statute on this subject is Section 7207 of Title 26 of the United States Code, which provides, in part, as follows:

> "Any person who willfully delivers or discloses to the Secretary any . . . document, known by him to be fraudulent or to be false as to any material matter, shall be guilty of an offense against the United States."

To prove a violation of Section 7207, the Government must establish each of the following three elements beyond a reasonable doubt:

One, the Defendant willfully delivered, or caused to be delivered, to the Internal Revenue Service a document: two, the document is false or fraudulent as to a material matter; and, three, in delivering this document, or causing it to be delivered, the Defendant acted willfully.

Unlike Section 7206, paragraph (1), there is no requirement that the document that has been delivered to the Internal Revenue Service be signed under penalties of perjury or even that the document be signed.

It is enough to show that the document was delivered or disclosed to the Internal Revenue Service.

In order to find Defendant guilty of causing a false document to be delivered to the Internal Revenue Service, you must find that the document was false as to a material matter as alleged in the indictment. Materiality in a Section 7207 offense does not depend on whether the false statement has any bearing

on the tax liability of the Defendant. A statement is material if it could have influenced the Internal Revenue Service's decisions or activities.

A false or fictitious statement is an assertion which is untrue when made or used and which is known by the persons making it or using it to be untrue.

A fraudulent statement is an assertion which is known to be untrue and which is made or used with the intent to deceive.

In order to sustain its burden of proof for the crimes named in the indictment, the Government must prove beyond a reasonable doubt that the Defendant acted willfully.

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.

Negligent conduct is not sufficient to constitute willfulness.

You have heard that a lawyer talked to one or more of the witnesses. There is nothing wrong with this. A lawyer may talk to a witness to find out what the witnesses know about the case and what the witness's testimony will be.

Next, I want to say a word about the dates mentioned in the indictment.

The indictment charges that the crimes happened on or about certain dates. The Government does not have to prove that the crimes happened on those exact dates. But the Government

must prove that the crimes happened reasonably close to those dates.

Next, I want to explain something about proving a Defendant's state of mind.

Ordinarily, there's no way that a Defendant's state of mind can be proved directly, because no one can read another person's mind and tell what a person is thinking.

But a Defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the Defendant said, what the Defendant did, how the Defendant acted, and any other facts or circumstances in evidence that show what was in the Defendant's mind.

You may also consider the natural and probable results of any acts that the Defendant knowingly did or did not do, and whether it is reasonable to conclude that the Defendant intended those results. This, of, of course is for all of you to decide.

That concludes my part of the instructions explaining the elements of the crime. Next I will explain some rules that you must use in considering some of the testimony and evidence.

* * *

APPENDIX D

LJUPCO RISTOVSKI
INCOME RECOMPUTATION 1989 & 1990

LJUPCO RISTOVSKI

UNREPORTED INCOME RECEIVED
FROM MASON IRON AND METAL COMPANY

1989

DATE	MASON CO. CHECK NO.	PAYEE	AMOUNT	ENDORSEMENT	EXHIBIT NUMBER
1-9-89	44010	Cash	$5,000.00	B. Jovanovski	5B
1-9-89	44011	Cash	$5,000.00	B. Jovanovski	5B
2-7-89	44338	Cash	$7,542.00	B. Jovanovski	5B
3-7-89	44711	Cash	$5,000.00	Mark Sieradzki	5B
3-7-89	44712	Cash	$5.000.00	Mark Sieradzki	5B
4-6-89	45053	Cash	$5,000.00	Mark Sieradzki	5B
4-6-89	45054	Cash	$5,000.00	Mark Sieradzki	5B
5-3-89	45226	Cash	$8,000.00	Joan Penny	5B
5-3-89	45227	Cash	$8,000.00	Joan Penny	5B
5-3-89	45228	Cash	$9,000.00	Joan Penny	5B
8-10-89	46518	Cash	$5,000.00	Joan Penny	5B
8-10-89	46519	Cash	$5,000.00	Joan Penny	5B
9-8-89	46893	Cash	$5,000.00	Joan Penny	5B
10-5-89	47228	Cash	$5,000.00	Petre Kostovski	5B
11-6-89	47604	Cash	$5,000.00	Petre Kostovski	5B
12-8-89	47963	Cash	$5,000.00	Suzanne Kostovski	5B
		SUBTOTAL	$92,542.00		
Less:		REDUCTIONS TO UNREPORTED INCOME		DESCRIPTION	
		Deposits to Precision Steel from Ristovski's funds			
		January 19, 1989	($7,000.00)	Reimb for shear	17A
		May 15,1989	($9,000.00)	Currency	17A
		May 15,1989	($9,000.00)	Currency	17A
		May 15,1989	($5,000.00)	Currency	17A
		NET UNREPORTED INCOME RECEIVED FROM MASON IRON AND STEEL IN 1989	$62,542.00		

BEST AVAILABLE COPY

GOVERNMENT EXHIBIT 17c

RISTOVSKI, LJUPCO

COMPUTATION OF CORRECTED TAXABLE INCOME
AND TAX DUE AND OWING
1989

EXHIBIT

Taxable Income per Return as Filed	$4,793.17
Unreported Income Received in 1989 From Mason Iron and Steel	$62,542.00
Corrected Taxable Income	$67,335.17
Tax on Corrected Income	$17,564.11
Tax shown on Return as Filed	$716.00
TAX DUE AND OWING FOR 1989	$16,848.11

LJUPCO RISTOVSKI

UNREPORTED INCOME RECEIVED
FROM MASON IRON AND METAL COMPANY

1990

DATE	MASON CO. CHECK NO.	PAYEE	AMOUNT	ENDORSEMENT	EXHIBIT NUMBER
1-22-90	48361	Cash	$5,000.00	Petre Kostovski	5C
2-16-90	48697	Cash	$5,000.00	Petre Kostovski	5C
3-8-90	49014	Cash	$5,000.00	Petre Kostovski	5C
4-11-90	49365	Cash	$5,000.00	Petre Kostovski	5C
4-11-90	49367	Cash	$5,000.00	Petre Kostovski	5C
5-29-90	49857	Cash	$5,000.00	Petre Kostovski	5C
5-29-90	49858	Cash	$5,000.00	Petre Kostovski	5C
7-6-90	50511	Cash	$7,000.00	Petre Kostovski	5C
		TOTAL	$42,000.00		

Less: REDUCTIONS TO UNREPORTED INCOME		DESCRIPTION	
Deposits to Precision Steel from Ristovski's funds			
June 20, 1990	($5,000.00)	Currency	17B
June 21, 1990	($4,000.00)	Money order	17B
December 12, 1990	($5,000.00)	Official check	17B
Asset downpayments made in behalf of Precision Steel			
June 19, 1990	($500.00)	Pete cash down	17B
NET UNREPORTED INCOME RECEIVED FROM MASON IRON AND STEEL IN 1990	$27,500.00		

RISTOVSKI, LJUPCO

COMPUTATION OF CORRECTED TAXABLE INCOME
AND TAX DUE AND OWING
1990

EXHIBIT

Taxable Income per Return as Filed	$14,748.33
Unreported Income Received in 1990 From Mason Iron and Steel	$27,500.00
Corrected Taxable Income	$42,248.33
Tax on Corrected Income	$9,295.00
Tax shown on Return as Filed	$2,209.00
TAX DUE AND OWING FOR 1990	$7,086.00